

BEFORE THE PRE-TRIAL CHAMBER**EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA****FILING DETAILS****Case No:** 003/07-09-2009-ECCC/OCIJ (PTC38) **Party Filing:** The Defence for MEAS Muth**Filed to:** The Pre-Trial Chamber**Original language:** ENGLISH**Date of document:** 17 June 2021**CLASSIFICATION****Classification of the document suggested by the filing party:****PUBLIC****Classification by OCIJ or Chamber:****សាធារណៈ/Public****Classification Status:****Review of Interim Classification:****Records Officer Name:****Signature:**

**MEAS MUTH'S REQUEST TO TERMINATE, SEAL, AND ARCHIVE CASE FILE
003**

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All Civil Parties in Case 003

Mr. MEAS Muth, through his Co-Lawyers (“the Defence”), pursuant to the Pre-Trial Chamber’s (“PTC”) duty to pronounce as the final jurisdiction over the investigation phase,¹ “commitment to legal certainty and transparency of proceedings” under Rule 21,² inherent jurisdiction,³ and power to decide issues of general significance to the ECCC’s jurisprudence and legacy,⁴ requests it to terminate, seal, and archive Case File 003. Forthwith. The Defence requests to file this Request in English with the Khmer translation to follow, since the Interpretation and Translation Unit cannot complete the translation within a reasonable time.⁵

I. BACKGROUND

1. Mr. MEAS Muth has been under investigation for 13 years. One National and five International Co-Investigating Judges (“CIJs”) investigated the case. At the conclusion of the investigation, the National Co-Investigating Judge (“NCIJ”), YOU Bunleng, and Michael Bohlander, the final International Co-Investigating Judge (“ICIJ”) at the ECCC, opting not to seize the PTC of their disagreements, issued separate and opposing Closing Orders, simultaneously sending to trial and dismissing Case 003. The PTC declared the issuance of those Closing Orders to be illegal, just as they did in Case 004/2. The PTC did not avail itself to the remedies to the illegal Closing Orders outlined by the Supreme Court Chamber (“SCC”) when terminating Case 004/2, instead ordering that Case 003 be both archived and sent to trial. When requested to forward Case 003 to the Trial Chamber (“TC”), the CIJs determined that the PTC remains seized and responsible for the pre-trial proceedings.
2. ***The Co-Prosecutors disagreed on whether Case 003 should be prosecuted.*** At the outset of the investigation on 20 November 2008, the International Co-Prosecutor (“ICP”) seized the PTC of a disagreement, stating that he intended to file new Introductory Submissions in what would become Cases 003 and 004.⁶ His National counterpart, the National Co-Prosecutor (“NCP”) “disagree[d] with prosecuting the crimes identified in the new

¹ *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC60), Considerations on Appeals Against Closing Orders, 19 December 2019, D359/24 & D360/33 (“Case 004/2 PTC Considerations”), paras. 41, 122.

² *Id.*, para. 68.

³ *Id.*, para. 51.

⁴ *Id.*, paras. 32, 50.

⁵ See Email from Interpretation and Translation Unit to Defence, “Re: Translation Request,” 16 June 2021, indicating that the translation cannot be completed until 23 June 2021.

⁶ International Co-Prosecutor’s Written Statement of Facts and Reasons for Disagreement pursuant to Rule 71(2), 20 November 2008, Doc. No. 1, para. 2.

submissions,”⁷ considering that the facts of Case 003 were already covered by the Introductory Submission in Case 002, that Mr. MEAS Muth and SOU Met (who later passed away)⁸ “were not senior leaders or those most responsible because of their comparatively low rank in the Democratic Kampuchea regime,” and that “peace, stability, and national reconciliation in Cambodia argue against initiating new prosecutions.”⁹

3. ***The PTC Judges disagreed on whether Case 003 should be prosecuted.*** The PTC could not reach a supermajority on the Co-Prosecutors’ disagreement.¹⁰ The National PTC Judges agreed with the NCP that the facts of Case 003 were covered by Case 002,¹¹ and considered that the ICP unilaterally opened the investigation without notifying the NCP.¹² The International PTC Judges disagreed with the NCP’s assessment as to the conduct of the preliminary investigation by the ICP and found that the Introductory Submission in Case 003 refers to new facts in addition to those that overlap with Case 002.¹³ Since the PTC failed to reach a supermajority, the investigation proceeded,¹⁴ and on 7 September 2009, the Acting ICP filed the Introductory Submission in Case 003.¹⁵
4. ***The CIJs begin investigating.*** NCIJ YOU Bunleng and ICIJ Marcel Lemonde, the first ICIJ, began investigating and developing a detailed work plan.¹⁶ The NCIJ and ICIJ Lemonde investigated crimes committed by the Khmer Rouge for over two years, determining whether those investigated were most responsible during the Democratic

⁷ *Id.*, para. 120.

⁸ Dismissal of Allegations Against SOU Met, 2 June 2015, D86/3.

⁹ Annex I: Public Redacted Version Consideration of the PTC Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, paras. 29-32.

¹⁰ *Id.*, para. 45.

¹¹ *Id.*, Opinion of Judges Prak Kisman, Ney Thol, and Huot Vuthy, paras. 27, 30.

¹² *Id.*, Opinion of Judges Prak Kisman, Ney Thol, and Huot Vuthy, para. 18.

¹³ *Id.*, Opinion of Judges Downing and Lahuis, paras. 4, 22.

¹⁴ See Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea (2003) (“Agreement”), Art. 7(4). See also Rule 72(4).

¹⁵ Acting International Co-Prosecutor’s Notice of Filing of the Second Introductory Submission, 7 September 2009, D1/1.

¹⁶ ECCC Court Report: Issue 26 (June 2010), p. 2, <https://www.eccc.gov.kh/sites/default/files/publications/The%20Court%20Report%20%5BJune%202010%5D%20FINAL.pdf>.

Kampuchea period.¹⁷ Before ICIJ Lemonde resigned “to take up other long-standing plans,”¹⁸ the CIJs collected more than 1,130 pieces of evidence in Case 003.¹⁹

5. ***The investigation concludes.*** When ICIJ Siegfried Blunk took over from ICIJ Lemonde on 1 December 2010,²⁰ he continued investigating alongside the NCIJ,²¹ focusing on determining whether Mr. MEAS Muth falls under the ECCC’s personal jurisdiction.²² The CIJs “established joint working groups,”²³ “agreed on the investigative methods,”²⁴ and investigated “in a smooth manner and in complete agreement.”²⁵ Over the course of the following five months, the CIJs collected additional evidence²⁶ and reviewed over 3,000 inculpatory and exculpatory pieces of evidence from Cases 001, 002, and 003.²⁷ The CIJs “focus[ed] for a while on analyzing the 10,000 evidentiary documents and 700 witness interviews compiled in Case 002 for their relevance to Cases 003 and 004” before resuming field investigations and questioning “key witnesses,” including Duch.²⁸ After 20 months of investigation, on 29 April 2011, the CIJs concluded their investigation, “unanimously

¹⁷ The CIJs were seized of investigating Cases 001 and 002 on 18 July 2007. See *Case of KAING Guek Eav*, 001/18-07-2007-ECCC-OCIJ, Closing Order indicting KAING Guek Eav alias Duch, 8 August 2008, D99, para. 4; *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, D427, para. 3.

¹⁸ ECCC Court Report: Issue 29 (September 2010), p.2, https://www.eccc.gov.kh/sites/default/files/publications/Court_Report_September2010.pdf. See also ECCC Website, *Judge Marcel Lemonde*, <https://www.eccc.gov.kh/cn/person/judge-marcel-lemonde>.

¹⁹ A search on ZyLAB reveals that, between 7 September 2009 and 30 November 2010, the Office of the Co-Investigating Judges (“OCIJ”) placed 1,134 documents in English, Khmer, and French on the Case File. See ZyLAB “Case File: CF003,” “Filing Date: between 7 September 2009 and 30 November 2010,” and “Filing Party: OCIJ.” Some documents placed on the Case File during this period may be duplicates.

²⁰ ECCC Press Release, *Dr. Siegfried Blunk appointed as new international Co-Investigating Judge*, 1 December 2010, <https://www.eccc.gov.kh/cn/articles/dr-siegfried-blunk-appointed-new-international-co-investigating-judge>.

²¹ ECCC Press Release, *Press Release by the International Co-Investigating Judge*, 10 October 2011, https://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2012-12-24%2016%3A37/E189_3_1_1.3_EN.pdf.

²² ECCC Court Report: Issue 33 (February 2011), p. 7, https://www.eccc.gov.kh/sites/default/files/publications/Court_Report_February_2011.pdf.

²³ ECCC Court Report: Issue 33 (February 2011), p. 7, https://www.eccc.gov.kh/sites/default/files/publications/Court_Report_February_2011.pdf.

²⁴ Order Dismissing the Case Against MEAS Muth, 28 November 2018, D266 (“Dismissal Order”), para. 48.

²⁵ *Id.*, para. 41.

²⁶ A search on ZyLAB reveals that, between 1 December 2010 and 29 April 2011, the OCIJ placed 302 documents in English, Khmer, and French on Case File 003. See ZyLAB “Case File: CF003,” “Filing Date: between 1 December 2010 and 29 April 2011,” and “Filing Party: OCIJ.” Some documents placed on the Case File during this period may be duplicates.

²⁷ Dismissal Order, paras. 42, 48, 359.

²⁸ Thomas Miller, *KRT judge talks court controversies*, PHNOM PENH POST, 18 August 2011, available at <https://www.phnompenhpost.com/national/krt-judge-talks-court-controversies>.

agree[ing]” not to charge Mr. MEAS Muth.²⁹ After statements in the press called into question ICIJ Blunk’s independence and integrity, he resigned out of principle.³⁰

6. ***The investigation reopens.*** Then came Reserve International Co-Investigating Judge (“RICIJ”) Laurent Kasper-Ansermet, who was never sworn in as ICIJ.³¹ He unilaterally reopened the investigation³² for fear that the NCIJ would issue the Forwarding Order drafted alongside ICIJ Blunk, even though he admitted he did not review the Case File, and despite the NCIJ’s caution to review the evidence before taking any “hasty actions.”³³ Five months after reopening the investigation, RICIJ Kasper-Ansermet resigned.³⁴
7. ***Mr. MEAS Muth is charged.*** The NCIJ withheld from issuing the Forwarding Order, waiting for his new International counterpart, ICIJ Mark Harmon, to familiarize himself with the Case File,³⁵ discuss the status of the investigation, and internally register a disagreement on 7 February 2013.³⁶ Following the disagreement, the NCIJ issued his Forwarding Order, considering the investigation complete on 29 April 2011.³⁷ ICIJ Harmon meanwhile continued investigating,³⁸ since, to his understanding, the CIJs have “discretion to decide independently when they consider that an investigation has been concluded.”³⁹ When the NCIJ later sent a memorandum to ICIJ Harmon “regarding the conclusion of the

²⁹ Notice of Conclusion of Judicial Investigation, 29 April 2011, D13. Dismissal Order, para. 53.

³⁰ ECCC Press Release, *Press Release by the International Co-Investigating Judge*, 10 October 2011, https://www.eccc.gov.kh/sites/default/files/documents/court/2012-12-24%2016%3A37/E189_3_1_1.1.3_EN.pdf. ICIJ Blunk resigned effective 31 October 2011. See ECCC Website, *Dr. Siegfried Blunk*, <https://www.eccc.gov.kh/en/person/dr-siegfried-blunk>.

³¹ UN Press Release, *Statement Attributable to the Spokesperson for the Secretary-General on Cambodia*, 20 January 2012, <https://www.un.org/sg/en/content/sg/statement/2012-01-20/statement-attributable-spokesperson-secretary-general-cambodia>.

³² Order on Resuming the Judicial Investigation, 2 December 2011, D28.

³³ ECCC Press Release, *Press Statement by National Co-Investigating Judge*, 26 March 2012, <https://www.eccc.gov.kh/en/node/17495>.

³⁴ RICIJ Kasper-Ansermet resigned effective 4 May 2012. See ECCC Press Release, *Press Release by the International Reserve Co-Investigating Judge*, 19 March 2012, <https://www.eccc.gov.kh/en/articles/press-release-international-reserve-co-investigating-judge>.

³⁵ ICIJ Mark Harmon was sworn in as the fourth ICIJ on 26 October 2012. ECCC Press Release, *Mark Harmon sworn in as International Co-Investigating Judge*, 26 October 2012, <https://www.eccc.gov.kh/en/articles/mark-harmon-sworn-international-co-investigating-judge>.

³⁶ See Decision by the International Co-Investigating Judge to Place Case No.002 Transcripts on the Case File, 7 February 2013, D53/2, para. 10.

³⁷ Forwarding Order dated 07 February 2013, 7 February 2013, D52; Dismissal Order, para. 32. See also ECCC Press Release, *Statement by the Co-Investigating Judges Regarding Case 003*, 28 February 2013, <https://www.eccc.gov.kh/en/articles/statement-co-investigating-judges-regarding-case-003>.

³⁸ See Decision by the International Co-Investigating Judge to Place Case No.002 Transcripts on the Case File, 7 February 2013, D53/2, para. 12; Rogatory Letter, 7 February 2013, D54; Rogatory Letter, 7 February 2013, D55.

³⁹ Decision by the International Co-Investigating Judge to Place Case No.002 Transcripts on the Case File, 7 February 2013, D53/2, para. 5 (internal citations omitted).

investigation and possibilities for [the ICIJ] to appeal to the [PTC], requesting [the] re-opening [of] the investigation,”⁴⁰ ICIJ Harmon did not respond and continued investigating and gathering evidence.⁴¹ He eventually charged Mr. MEAS Muth⁴² four months before resigning “for strictly personal reasons.”⁴³

8. ***The final ICIJ is sworn in.*** After being sworn in on 31 July 2015, ICIJ Michael Bohlander, the last ICIJ, familiarized himself with the Case File, investigated and gathered evidence,⁴⁴ re-issued decisions made by ICIJ Harmon,⁴⁵ rescinded some of ICIJ Harmon’s charges,⁴⁶ and charged Mr. MEAS Muth with additional crimes.⁴⁷ The NCIJ waited for ICIJ Bohlander to conclude his investigation.

9. ***A funding crisis threatens the integrity of ECCC proceedings.*** When the court’s budgetary situation reached a “crisis point” in mid-2017, the CIJs contemplated permanently staying the proceedings,⁴⁸ finding it incompatible with the basic demands of a fair trial and the rule of law to issue a Closing Order – especially an Indictment that could “hang over the charged person” – if there were insufficient funds for appellate review by the PTC, “and, by extension, serious doubt about the parties getting their day in court before the [TC] ... and SCC.”⁴⁹ With rapid funding coming in, the CIJs deferred staying the proceedings pending further developments – prepared to take measures should judicial independence, fairness, and the integrity of the proceedings be threatened.⁵⁰

10. ***The investigation concludes, with a hint.*** After the filing of the ICP’s Final Submission and Defence Response, the CIJs notified the parties on 18 September 2017 that they considered separate and opposing Closing Orders based on a disagreement to be

⁴⁰ Dismissal Order, para. 44.

⁴¹ *Id.*, para. 44.

⁴² Notification of Charges Against MEAS Muth, 3 March 2015, D128.1.

⁴³ ICIJ Harmon resigned effective 31 July 2015. ECCC Press Release, *Judge Harmon announces his resignation*, 7 July 2015, <https://www.eccc.gov.kh/en/articles/judge-harmon-announces-his-resignation>.

⁴⁴ *See e.g.* Extension of Rogatory Letter D59, 26 August 2015, D59.13; Extension of Rogatory Letter D89, 26 August 2015, D89.11.

⁴⁵ Notice from the International Co-Investigating Judge to the Parties regarding Re-Issue of Decisions Taken by Judge Harmon on or After 31 July 2015, 8 September 2015, D149. *See e.g.* Re-Issued Decision on MEAS Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 11 September 2015, D120/3.

⁴⁶ Written Record of Initial Appearance, 14 December 2015, D174, p. 10.

⁴⁷ *Id.*, p. 9-10.

⁴⁸ Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2, 5 May 2017, D249, paras. 1, 75, 84.

⁴⁹ *Id.*, paras. 53-54.

⁵⁰ Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for YIM Tith, 11 August 2017, D249/6, paras. 63, 67.

permissible under the ECCC framework “and of the likely consequences for appellate process under Internal Rule 77(13).”⁵¹ In their understanding, the Rules did not require the Co-Prosecutors or the CIJs to seize the PTC of disagreements, thus permitting the filing of separate Final Submissions and issuance of separate Closing Orders.⁵² No appeals were filed against the CIJs decision. Nor did the PTC, which was publicly notified of the decision, order the CIJs to issue a single Closing Order or offer an advisory opinion.

11. ***The CIJs issue their Closing Orders.*** Just as they informed the parties,⁵³ on 28 November 2018, the CIJs issued separate and opposing Closing Orders based on the results of their investigation. The NCIJ called for dismissal, finding that Mr. MEAS Muth is not among those most responsible because, despite holding several roles, he “did not exercise much power” and “[h]is participation was inactive, unimportant, and not proximate to the commission of the crimes.”⁵⁴ ICIJ Bohlander found to the contrary,⁵⁵ indicting Mr. MEAS Muth for genocide, crimes against humanity, war crimes, and national crimes.⁵⁶
12. ***The parties appeal the Closing Orders.*** In their appeals filed on 8 April 2019, the Defence and ICP agreed that the ECCC framework permits the CIJs to issue separate and opposing Closing Orders, given the discretionary language of Rule 72, the interpretive guidance in Rule 1(2), and the CIJs’ equal status over the investigation, though disagreeing on which Closing Order prevails in the event neither is overturned by PTC supermajority.⁵⁷ The Defence argued that the Dismissal Order must prevail under the principle of *in dubio pro reo*, while the ICP argued that Rule 77(13)(b) mandates that the case proceed to trial on the Indictment.⁵⁸

⁵¹ Closing Order, 28 November 2018, D267 (“Indictment”), para. 19; *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Decision on AO An’s Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D262.2, para. 14.

⁵² *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Decision on AO An’s Request for Clarification, 5 September 2017, D353/1, para. 34; *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Decision on AO An’s Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D262.2, para. 14.

⁵³ *Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Decision on AO An’s Urgent Request for Disclosure of Documents Relating to Disagreements, 18 September 2017, D262.2, para. 14.

⁵⁴ Dismissal Order, para. 428.

⁵⁵ Indictment, para. 460.

⁵⁶ Indictment, p. 256-64.

⁵⁷ MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Indictment, 8 April 2019, D267/4, (“MEAS Muth’s Appeal”), paras. 34-48; International Co-Prosecutor’s Appeal of the Order Dismissing the Case Against MEAS Muth (D266), 8 April 2019, D266/2 (“ICP’s Appeal”), paras. 191-98.

⁵⁸ ICP’s Appeal, paras. 191-98.

13. ***Oral arguments are heard between 27 and 29 November 2019.*** On the third day of hearings, Judge Olivier Beauvallet questioned the ICP “regarding the simultaneously delivery of two contradictory Closing Orders.”⁵⁹ The ICP argued that the issuance of two Closing Orders is permissible, since “converting the permissive disagreement mechanism ... into a mandatory mechanism” would violate the language of the Agreement, Establishment Law, and Rules, and unduly limit the CIJs’ independent discretion.”⁶⁰ Though the Defence agreed with the ICP in its written appeal, it submitted that both parties may be in error: “[I]f we were wrong, and if [the CIJs] acted *ultra vires*, nothing would prevent [the PTC] from either remanding the matter back, having them reconstitute, and with instructions that they are to issue an order, or the possibility exists for [the PTC] to take it upon [itself].”⁶¹
14. ***The PTC issues its Considerations in Case 004/2.*** On 19 December 2019, before disposing of the cross-appeals in Case 003, the PTC issued its Considerations in Case 004/2, declaring the “issuance of Two Closing Orders was illegal, violating the ECCC framework.”⁶² Nonetheless, the National and International PTC Judges reviewed the merits of, and gave preference to, the Closing Orders of their choice.⁶³
15. ***The PTC issues contradictory instructions.*** Amid the subsequent litigation in Case 004/2, the PTC Judges issued contradictory memoranda on the legal effect of their Considerations:
- a. On 29 January 2020, PTC President Judge Prak Kimsan issued an interoffice memorandum stating that only the joint reasoning and disposition have legal effect and that notifying the Considerations to the TC “violat[es] the unanimous decision of [the] PTC;”⁶⁴
 - b. On 29 January 2020, the International PTC Judges responded that the President does not have the authority to instruct the Court Management Section (“CMS”), noting that CMS received contradictory instructions from the National and International PTC

⁵⁹ Transcript of Appeal Hearing in Case 003, 29 November 2019, D266/18.2, 11.25.07-11.26.26.

⁶⁰ Transcript of Appeal Hearing in Case 003, 29 November 2019, D266/18.2, 11.26.26-11.40.55. *See esp. id.* at 11.34.54-11.35.57.

⁶¹ Transcript of Appeal Hearing in Case 003, 29 November 2019, D266/18.2, 12.00.18-12.03.17.

⁶² Case 004/2 PTC Considerations, p. 61.

⁶³ *Id.*, p. 61. *See also id.*, paras. 273-302, 304-687, p. 266.

⁶⁴ *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC60), PTC Memorandum entitled “Clarification of the decision in the case 004/2,” 29 January 2020, D359/34, p. 2.

Greffiers – respectively, to archive the case and to notify the TC of the PTC’s Considerations;⁶⁵

- c. On 12 March 2020, the International PTC Judges insisted that their 29 January 2020 response was the “authoritative clarification” sought by the Office of Administration, stating: “[i]f the Office of Administration were to persists in its inactivity without legal basis, the re-composition of the [OCIJ] would have to be considered by the relevant stakeholders for the proceedings enshrined in Internal Rule 69(2)(a);”⁶⁶ and
- d. On 16 March 2020, the PTC President stated that the PTC “has already fulfilled its duty in accordance with the law and none of the administrative actions is required,” reiterating his position in his 29 January 2020 memorandum that only the joint reasoning and disposition have legal effect.⁶⁷

16. **Mr. MEAS Muth requests clarification.** On 27 March 2020, given the procedural stalemate in Case 004/2, the Defence requested clarification as to the legal basis under which the PTC Judges separately considered the merits of the illegal Closing Orders, as opposed to remitting the Case File to the CIJs with instructions to issue a single Closing Order or reviewing the Case File itself and issuing its own Closing Order.⁶⁸ In addition to questioning the legal basis as to how can a “default position” reserved for disagreements between the CIJs during the investigations be applied to resolve the illegal issuance of two Closing Orders,⁶⁹ the Defence requested specific clarification on whether:⁷⁰

- a. The CIJs followed the letter and spirit of the Agreement, Establishment Law, Rules, and PTC jurisprudence in issuing separate and opposing Closing Orders;
- b. Neither the Indictment nor Dismissal Order can stand since both were issued in contravention of Rule 67(1);

⁶⁵ *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC60), PTC Memorandum entitled “Notification of the PTC’s Considerations in Case 004/2,” 29 January 2020, D359/35, p. 5.

⁶⁶ *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC60), PTC Memorandum entitled “Transfer of Case File 004/2,” 12 March 2020, D359/36, para. 37.

⁶⁷ *Case of AO An*, 004/2/07-09-2009-ECCC/OCIJ (PTC60), PTC Memorandum entitled “Re-Confirmation of the Decision on Case File 004/2,” 16 March 2020, D359/37, p. 2.

⁶⁸ MEAS Muth’s Request for Clarification of the PTC’s Considerations Against Closing Orders in Case 004/2, 27 March 2020, D267/24, (“MEAS Muth’s Request for Clarification”), para. 15.

⁶⁹ *Id.*, para. 37.

⁷⁰ *Id.*, paras. 17, 19, 21, 23, 25, 27, 28, 31, 33, 35, 39.

- c. The PTC considered referring to Rule 76(7) to determine the consequences of declaring the issuance of separate and opposing Closing Orders illegal;
- d. The PTC failed to apply what it considers to be the applicable law by not remitting the Closing Orders to the CIJs with instructions and not reviewing the Case File itself;
- e. The PTC Judges were required to work collegially in reviewing the Case File once they opted not to remit the Closing Orders to the CIJs;
- f. The PTC would have better guaranteed legal certainty and transparency by remitting the Case File to the CIJs with instructions or reviewing the Case File itself;
- g. The PTC was obligated to provide a unanimous decision on the legal effect of the illegal issuance of the Closing Orders to guarantee legal certainty;
- h. The legal authority the National PTC Judges applied to justify reviewing the illegal Closing Orders;
- i. The National PTC Judges consider the Dismissal Order a legitimate basis to dismiss the case when the unanimous PTC held that the CIJs violated the ECCC framework;
- j. The National PTC Judges resorted to the principle of *in dubio pro reo* after applying the civil rules of interpretation to Rule 76(7) to resolve the illegal issuance of separate and opposing Closing Orders; and
- k. The TC can be seized of a procedurally defective, illegal Indictment under Rule 77(13)(b).

17. ***The TC declines to be seized of Case 004/2.*** Following the ICP's request for the TC to progress Case 004/2 to trial, the TC Judges issued a Press Release on 3 April 2020 stating they could not agree on common reasoning. The National TC Judges considered the TC had no authority to make any decision because it did not have access to the Case File, which was still under the PTC's authority, and because the Case was closed by virtue of the PTC's Considerations.⁷¹ The International TC Judges considered the TC "has *inherent authority*

⁷¹ ECCC Press Release, *Statement of the Judges of the Trial Chamber of the ECCC Regarding Case 004/2 Involving AO An*, 3 April 2020, <https://eccc.gov.kh/en/articles/statement-judges-trial-chamber-eccc-regarding-case-0042-involving-ao> ("Trial Chamber's Statement in Case 004/2").

to address some of the preliminary issues raised by the parties....” Since the TC could not reach a supermajority, “issuing a formal decision ... [was] not possible.”⁷²

18. **Mr. MEAS Muth requests to supplement his appeal.** Following the TC’s Press Release, the Defence requested to supplement his appeal since the TC’s statements raised the prospect of having an unchallengeable Indictment hanging over Mr. MEAS Muth in perpetuity.⁷³ The Defence submitted that the PTC, in accordance with their oath of office and responsibility to ensure the fairness of proceedings, must permanently stay proceedings unless the PTC agrees on the progress of Case 003.⁷⁴
19. **The ICP appeals the TC’s press release in Case 004/2.** Claiming the TC’s inaction and 3 April 2020 Press Release constituted a “decision” effectively terminating the case, the ICP appealed to the SCC on 4 May 2020.⁷⁵ She argued that the TC failed to give effect to the “default position,” failed to invoke its inherent powers to pronounce on justiciable issues, arbitrarily imposed additional administrative requirements for formal notification of the PTC’s Considerations, and effectively terminated the case on impermissible grounds.⁷⁶
20. **Mr. MEAS Muth requests to intervene in Case 004/2.** Since the SCC’s ruling in Case 004/2 would invariably impact on the proceedings in Case 003, the Defence sought to intervene in Case 004/2 to demonstrate why:⁷⁷
- a. The TC was not seized of the case since there were no valid Closing Order;
 - b. The TC’s 3 April 2020 Press Release, inaction, and return of the ICP’s submissions was not an “appealable” decision terminating the proceedings;
 - c. The PTC was still seized of Case 004/2, and thus it was not necessary for the SCC to exercise its inherent powers;

⁷² *Id.*

⁷³ MEAS Muth’s Supplement to his Appeal Against the International Co-Investigating Judge’s Indictment, 5 May 2020, D267/27 (“MEAS Muth’s Supplement”), para. 24.

⁷⁴ *Id.*, paras. 44-52.

⁷⁵ *Case of AO An*, 004/2/07-2009-ECCC-TC/SC, International Co-Prosecutor’s Immediate Appeal of the Chamber’s Effective Termination of Case 004/2, 4 May 2020, E004/2/1, para. 42.

⁷⁶ *Id.*, para. 43.

⁷⁷ *Case of AO An*, 004/2/07-2009-ECCC-TC/SC, MEAS Muth’s Request for Leave to Intervene and Respond to the International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 29 May 2020, E004/2/2 (“MEAS Muth’s Intervention Request”), paras. 11-12.

- d. The “default” position in the Agreement and Establishment Law providing that the “investigation shall proceed” when the Co-Prosecutors or CIJs disagree *only applies during the investigation phase*;
- e. Even if Rule 77(13)(b) is considered *lex specialis* vis-à-vis Rule 77(13)(a), both Rules were designed for the issuance of a single Closing Order and the PTC unanimously held that both Closing Orders were illegally issued;
- f. Rule 79(1) was also designed for a single Closing Order and does not mean that the TC can be seized of an illegally issued Indictment; and
- g. The Parties to the Agreement and drafters of the Establishment Law did not agree to send cases to trial when the CIJs issue separate and opposing Closing Orders.

21. The SCC denied the Defence’s request for intervention on 17 June 2020.⁷⁸

22. ***The SCC terminates Case 004/2.*** On 10 August 2020, the SCC terminated Case 004/2,⁷⁹ holding that once the PTC had unanimously declared the CIJs to have acted illegally, the Closing Orders were a nullity and it was irrelevant that the PTC did not attain a supermajority on the merits of the parties’ appeals.⁸⁰ “*A void act cannot create a lawful consequence or result. It therefore logically follows that the source action – each Closing Order – was of no legal effect.*”⁸¹ Despite finding that the objective of the dispute resolution mechanism is to “prevent a deadlock from derailing the proceedings from moving to trial,” the SCC “unequivocal[ly]” held that a “case cannot go to trial in the absence of a valid Closing Order.”⁸²

23. Noting that the PTC’s findings that Rule 79(1) suggests that the PTC “has the power to issue a new or revised closing order,” and that “fulfil[ing] the role of the Cambodian Investigation Chamber in the ECCC” shall investigate itself when seized of a Dismissal Order, the SCC considered that these findings “lead a reasonable reader to conclude that

⁷⁸ *Case of AO An*, 004/2/07-09-2009-ECCC/TC/SC, Decision on MEAS Muth’s Request for Leave to Intervene and Respond to the International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 17 June 2020, E004/2/2/1.

⁷⁹ *Case of AO An*, 004/2/07-09-2009-ECCC/TC/SC, Decision on International Co-Prosecutor’s Immediate Appeal of the Trial Chamber’s Effective Termination of Case 004/2, 10 August 2020, E004/2/1/1/2 (“Case 004/2 SCC Decision”).

⁸⁰ *Id.*, para. 53.

⁸¹ *Id.*, para. 67.

⁸² *Id.*, para. 68.

the [PTC] was aware of its powers to go beyond the illegality of the situation relating to the issuance of two conflicting Closing Orders and to issue its own valid closing order.”⁸³ It found that the PTC “should have gone a step further and provided an actual final ruling.”⁸⁴

24. Considering that the CIJs’ “rigidly held” irreconcilable differences led them to register disagreements and inevitably to issue separate and opposing Closing Orders,⁸⁵ that the ICP was acting without the support (or opposition of) the NCP,⁸⁶ and that “there was no agreement after thirteen years of investigations that AO An was within the jurisdiction of the Court,” the SCC found that absent an enforceable Indictment, Case 004/2 should be terminated.⁸⁷

25. ***The PTC denies Mr. MEAS Muth’s request for clarification.*** On 3 November 2020, the PTC denied Mr. MEAS Muth’s request for clarification, considering that the PTC’s issuance of considerations or decisions in different proceedings “has no immediate impact on the pending case,” though stating that the PTC “is not insensitive to the argument that its rulings may be misunderstood.”⁸⁸ Despite the contradictory memoranda from the PTC as to the legal effect of its Case 004/2 Considerations, it found that the “Considerations in Case 004/2 provided the legal certainty and transparency required for a judicial decision emanating from the Chamber under the specific circumstances of that case.”⁸⁹

26. ***The PTC denies Mr. MEAS Muth’s supplement.*** PTC denied Mr. MEAS Muth’s supplement on the same day it denied his request for clarification, finding that the TC’s Press Release in another case “has neither immediate nor direct impact on the pending case,”⁹⁰ that the appeals have been extensively briefed and orally argued,⁹¹ and that the circumstances did not warrant recourse to its inherent powers (though reaffirming it has inherent powers to safeguard the good and fair administration of justice).⁹²

⁸³ *Id.*, para. 61, quoting *inter alia* Case 004/2 PTC Considerations, para. 30.

⁸⁴ Case 004/2 SCC Decision, para. 61.

⁸⁵ *Id.*, para. 62.

⁸⁶ *Id.*, para. 64.

⁸⁷ *Id.*, para. 69.

⁸⁸ Decision on MEAS Muth’s Request for Clarification of the PTC Considerations on Appeals Against Closing Orders in Case 004/2, 3 November 2020, D266/24 & D267/32, para. 28.

⁸⁹ *Id.*, para. 31.

⁹⁰ Decision on MEAS Muth’s Supplement to His Appeal Against the International Co-Investigating Judge’s Indictment, 3 November 2020, D267/33, para. 32.

⁹¹ *Id.*, para. 33.

⁹² *Id.*, para. 35.

27. *The PTC issues its Considerations in Case 003.* On 7 April 2021, 16 months after oral arguments, the PTC issued its Considerations in Case 003, adopting and incorporating much of its reasoning from its considerations in Case 004/2.⁹³ “[C]ondemn[ing] once again the legal predicament that the [CIJs’] unlawful actions precipitated upon yet another ECCC proceeding,”⁹⁴ the PTC acidly intimates (as in Case 004/2) that the CIJs deliberately and calculatedly perverted the course of justice, since “they may have intended to defeat the default position and frustrate the authority of the [PTC]”⁹⁵ by agreeing to simultaneously issue separate and opposing Closing Orders.
28. The PTC found that the CIJs’ “errors have jeopardised the whole system upheld by the Royal Government of Cambodia and the United Nations,” and that more than a mere violation of the ECCC framework, “the [CIJs’] *mauvaises pratiques* may amount to a denial of justice,” since the PTC “[was] unable to exclude that they may have intended to defeat the default position and frustrate the authority of the PTC.”⁹⁶
29. Interpreting Rule 67(1) to unambiguously provide for a single Closing Order *either* indicting the Charged Person *or* dismissing the case,⁹⁷ the PTC found that the CIJs “committed a gross error of law in this case by finding that the ECCC legal framework permits the issuance of separate and opposing Closing Orders,”⁹⁸ “undermine[d] the very foundations of the hybrid system and proper functioning of the ECCC,”⁹⁹ “were aware of the difficulties their actions would be causing not only on appeal, but beyond the pre-trial and appellate stage of the Case 003 proceedings,”¹⁰⁰ and wantonly refrained from exercising their judicial duty to decide matters of which they were seized.¹⁰¹
30. The PTC also found it “disturbing that the conflicting Closing Orders were issued on the same day in only one language with a joint declaration by the two [CIJs] that they agreed on the issuance of the separate and conflicting Closing Orders,”¹⁰² and that the CIJs offered

⁹³ Compare Considerations on Appeals Against Closing Orders, 7 April 2021, D266/27 & D267/35 (“Case 003 PTC Considerations”), paras. 78-109 with Case 004/2 PTC Considerations, paras. 91-124.

⁹⁴ Case 003 PTC Considerations, para. 109.

⁹⁵ *Id.*, para. 108.

⁹⁶ *Id.*, para. 108.

⁹⁷ *Id.*, para. 103.

⁹⁸ *Id.*, para. 88. See also *id.*, para. 105, where the PTC claimed that the CIJs committed “manifest errors of law on which their reasoning is based.”

⁹⁹ Case 003 PTC Considerations, para. 106.

¹⁰⁰ *Id.*, para. 107.

¹⁰¹ *Id.*, para. 105.

¹⁰² *Id.*, para. 107.

“remarkably minimal reasoning, simply recalling two of their prior Decisions.”¹⁰³ Continuing in the same vein, the PTC found that “more than an isolated example, [the CIJs’] actions in this case confirm a pattern that the [CIJs] have apparently adopted in dealing with all the final cases on the ECCC’s docket,”¹⁰⁴ “not[ing] with regret that never, to its knowledge, has there been criminal cases in the history of other national and international legal systems that concluded with the simultaneous issuance of two contrary decisions emanating from one single judicial office.”¹⁰⁵

31. While reaffirming its powers to investigate and to issue a revised Closing Order, the PTC declined to follow the SCC’s ruling in Case 004/2. As they did in Case 004/2, the PTC Judges split into their respective National and International sides to give preference to the Closing Orders of their choice.¹⁰⁶
32. Though taking a different tack than in their separate opinion in Case 004/2, the National PTC Judges similarly found that Case File 003 “should be held at the ECCC archives.”¹⁰⁷ They reasoned that the PTC cannot apply the dispute resolution mechanism in Rule 72 because the CIJs agreed not to refer their disagreement to the PTC, “the two Closing Orders are of the same value and stand valid”¹⁰⁸ in light of Rule 77(13), the CIJs enjoy equal status, and according to the principle of the presumption of innocence, “the law does not allow the PTC to rule that the act of any [CIJ] has preponderance,”¹⁰⁹ and “[t]herefore, the two Closing Orders maintain the same value.”¹¹⁰
33. Similar to their position in Case 004/2, despite claiming perceived ill-intent and unsound flaws, despite condemning the ICIJ’s agreement to issue his Indictment simultaneously with his National colleague’s Dismissal Order, and despite declaring the issuance of two Closing Orders to be illegal, the International PTC Judges pronounced the ICIJ’s Indictment valid and the NCIJ’s Dismissal Order *ultra vires*.¹¹¹ Notwithstanding the discretionary language in Rule 72(2), the International PTC Judges reasoned that the CIJs

¹⁰³ *Id.*, para. 106.

¹⁰⁴ *Id.*, para. 108.

¹⁰⁵ *Id.*, para. 109.

¹⁰⁶ Case 003 PTC Considerations, paras. 111-18; 119-358.

¹⁰⁷ *Id.*, para. 118.

¹⁰⁸ A translation discrepancy appears in paragraph 115. It should read “the two Closing Orders are of the same value and same validity.” (Unofficial translation).

¹⁰⁹ Case 003 PTC Considerations, paras. 113-16.

¹¹⁰ *Id.*, para. 117.

¹¹¹ *Id.*, para. 259.

were required to resort to the dispute resolution mechanism prior to issuing the Closing Orders,¹¹² pronouncing that the “principle of continuation of judicial investigation governs the issue at hand.”¹¹³

34. Ruling on the validity of each Closing Order, the International PTC Judges, despite finding the Indictment to be valid, found that the ICIJ:

- a. Arbitrarily complied with the Rule 66(1) notice of conclusion, depriving the parties of the 15-day period to file investigative requests;¹¹⁴
- b. Was not diligent in communicating the Case File and created excessive delay by waiting two months after the issuance of the second Rule 66(1) notice to forward the Case File to the Co-Prosecutors;¹¹⁵
- c. Failed to issue his Indictment within a reasonable time;¹¹⁶
- d. Erroneously “readopt[ed] the hierarchical and formalistic categorisation of evidence based on its provenance, rather than its substance;”¹¹⁷ and
- e. Failed to order Mr. MEAS Muth’s pre-trial detention.¹¹⁸

35. Concerning the NCIJ, the International PTC Judges found that the Dismissal Order was “an attempt to avoid the compulsory disagreement procedure,” is “a brazen attempt to entirely circumvent this essential and mandatory requirement, thwarting the ECCC founding legal texts,” and is “*ultra vires* and, therefore, void, as it constitutes an attempt to defeat the default position enshrined in the ECCC framework.”¹¹⁹

36. The International PTC Judges also expressed their disagreement with the SCC, though declining to explain why the PTC did not follow the remedies outlined by the SCC based on the PTC’s own pronouncements, finding that the SCC:

¹¹² *Id.*, paras. 256-58.

¹¹³ *Id.*, para. 256.

¹¹⁴ *Id.*, paras. 139-41.

¹¹⁵ Case 003 PTC Considerations, paras. 142-43.

¹¹⁶ *Id.*, para. 130.

¹¹⁷ *Id.*, para. 156.

¹¹⁸ *Id.*, paras. 345-58.

¹¹⁹ *Id.*, paras. 260, 262.

- a. Made a “notable leap of reasoning” by “appear[ing] to equivocate the [PTC’s] holding that the [CIJs’] course of action in issuing the Closing Orders was illegal with the conclusion that the Closing Orders were ‘void’ as such;”¹²⁰
- b. Made a “sweeping conclusion without a reasoned demonstration” as to why the procedural illegality of the CIJs’ actions in producing the Closing Orders “would result in the complete vitiation of the two Closing Orders in question” because procedural errors must result in a “grossly unfair outcome in judicial proceedings” to lead to a reversal of a judgment;¹²¹
- c. “[C]rafted as a convenient pretext to bring the proceedings to an end” the “alleged administrative prerequisites of notification and transmission;”¹²²
- d. Found it unnecessary “to analyse the body text of the [PTC’s] actual decision to clarify ... whether the [PTC] unanimously found both Closing Orders null and void;”¹²³
- e. Arbitrarily ended Case 004/2 with no Closing Order, which “does not bring legal certainty, clarity, nor finality;”¹²⁴
- f. Made its decision without reviewing the evidence “through termination instruction in the nature of an executive fiat;”¹²⁵
- g. Misread the PTC’s unanimous decision on the illegal accord between the CIJs “to evade the disagreement settlement procedure,” by failing to appreciate that the investigation proceeds;¹²⁶ and
- h. “[I]nsinuated that the termination of the proceedings was appropriate considering the thirteen-year long investigations ... [which] cannot serve as a valid legal basis since the ECCC legal framework does not proscribe a rigid time limit after which the [SCC] can close a case by executive order.”¹²⁷

¹²⁰ *Id.*, para. 273.

¹²¹ *Id.*, fn. 609.

¹²² *Id.*, fn. 594.

¹²³ *Id.*, para. 274.

¹²⁴ *Id.*, para. 279.

¹²⁵ *Id.*, para. 280.

¹²⁶ *Id.*, para. 275.

¹²⁷ *Id.*, fn. 621.

37. ***The TC informs that it is not seized of Case 003.*** Following the PTC’s Considerations in Case 003, the ICP filed her witness list. The TC Greffier advised that “the [TC] has not been notified of the ‘Considerations on Appeals against the Closing Orders’ and is not in receipt of the case file. Therefore, the [TC] does not accept any communications from the parties, (see also IR 77/14).”¹²⁸
38. ***The ICP requests the CIJs to forward Case File 003 to the TC.*** On 19 April 2021, the ICP requested the CIJs to take all necessary administrative actions to direct the CMS to forward Case 003 to the TC.¹²⁹ The Defence responded that the ICP’s request is inadmissible because both Closing Orders are null and void, the International PTC Judges provided no cogent reasons or legal authority for departing from the SCC’s analysis, the PTC remains seized of the case, and the PTC did not find by supermajority that the Indictment is valid.¹³⁰
39. ***The CIJs deny the ICP’s request to forward the Case File.*** On 20 May 2021, the CIJs rejected the ICP’s request as ill-founded.¹³¹ While previously opting for judicial restraint “on occasion of the aftermath of the PTC’s considerations in Case 004/2,” the CIJs, as a preliminary matter, felt the need to remind their colleagues in the PTC of their duties under their respective national codes of judicial ethics, and of the general law of libel and slander, in accusing the CIJs of perverting the course of justice by deliberately evading the dispute resolution mechanism.¹³² The CIJs then explained in detail the events leading to their issuing the separate and opposing Closing Orders, their understanding of the soundness and impact of the SCC’s ruling in Case 004/2, and their understanding of the remedies available to the PTC in resolving the current procedural deadlock.¹³³
40. The CIJs found that there “was no point whatsoever in triggering the disagreement procedure over jurisdiction before the PTC, because the result was a foregone conclusion.”¹³⁴ It “would have meant needless delay and a useless waste of time and

¹²⁸ Email from IM Suy-Hong entitled “Re: Request for extension of time to file Rule 80 list of witnesses and experts,” 27 April 2021.

¹²⁹ International Co-Prosecutor’s Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber, 19 April 2021, D270.

¹³⁰ MEAS Muth’s Response to the International Co-Prosecutor’s Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber, 12 May 2021, D270/4, para. 18.

¹³¹ Decision on the International Co-Prosecutor’s Request to the Co-Investigating Judges to Forward Case File 003 to the Trial Chamber, 20 May 2021, D270/7 (“CIJs’ Decision on Forwarding Case File 003”), para. 28.

¹³² *Id.*, paras. 9-14.

¹³³ *Id.*, paras. 15-25.

¹³⁴ *Id.*, para. 15.

resources,”¹³⁵ because “even if we had asked the PTC for a ruling on the issue of the lawfulness of split COs, we would very likely have been told that this was not a disagreement procedure but a request for an advisory opinion, something which the PTC has ... consistently refused to entertain.”¹³⁶

41. The CIJs also noted that the PTC as early as August 2014 was requested to provide its own understanding of the law should the CIJs issue separate and opposing Closing Orders based on a disagreement between them.¹³⁷ The PTC found “that the scenario envisaged in the Request ... [was] hypothetical,” and as such the PTC held that it had “no jurisdiction to deal with hypothetical matters or provide advisory opinions.”¹³⁸
42. The CIJs – “much like the SCC – [were] at a loss as to how the PTC’s judges could say *per curiam* in case 004/2 that split COs are manifestly illegal and a violation of the very framework of the ECCC, only for the NJs and IJs to proceed to discuss the merits and to split themselves in upholding the CO the result of which appealed to them.”¹³⁹
43. The CIJs considered that “[i]f [their] error in issuing split COs was as egregious as described at length by the PTC in both Considerations, the COs should ideally have *both* been immediately and unanimously quashed for serious procedural defect without the PTC spending any time on discussing the merits, and the case be remanded to us with instructions not to split the CO.”¹⁴⁰ “A procedural error of such an order of magnitude in any decision during the investigation would have inevitably led to its annulment and its being struck from the case file as void.”¹⁴¹
44. Concerning the legal effect of the PTC Considerations, the CIJs found “only the joint part of the PTC’s considerations can have any binding effect because it was drafted unanimously.”¹⁴² “The IJ’s insistence in both Case 004/2 and Case 003 that the indictment stands – and the dismissal order is *ultra vires* or ‘less in conformity’ with the applicable law – simply because the outcome is in accordance with the default rule, is ultimately

¹³⁵ *Id.*, para. 15.

¹³⁶ *Id.*, para. 20, citing *Case of YIM Tith*, 004/07-09-2009-ECCC/OCIJ (PTC11), Decision on YIM Tith’s Appeal Against the Decision Denying his Request for Clarification, 13 November 2014, D205/1/1/2, paras. 7-8.

¹³⁷ CIJs’ Decision on Forwarding Case File 003, para. 20.

¹³⁸ *Id.*, para. 20.

¹³⁹ *Id.*, para. 21.

¹⁴⁰ *Id.*, para. 20.

¹⁴¹ *Id.*, para. 21.

¹⁴² *Id.*, para. 21.

unconvincing, given that the NJs, albeit contrary to what they had held jointly with the IJs, chose to pursue the opposite direction.”¹⁴³ They also found that the National PTC Judges’ “linguistic U-turn” in holding “in case 003 that *both COs are valid* does not change that conclusion, because they still went ahead and directly gave the *administrative* instruction that case file 003 be archived.”¹⁴⁴

45. The CIJs provided three solutions to break the deadlock in Case 003, noting that the PTC already had opportunities to apply them: (a) “either unanimously remanding the case back to us for serious procedural error – and without engaging in the merits – with instructions to issue one joint CO;” (b) “or doing so itself by unanimously applying its own alleged default rule and sending the case for trial;” or (c) “given the actual remaining disagreement in the PTC from ... terminating the case, as the SCC had to do ultimately in Case 004/2.”¹⁴⁵

II. ADMISSIBILITY

46. The PTC has a judicial duty to pronounce on the issues raised in this Request, being the “final jurisdiction over the pre-trial stage.”¹⁴⁶ “[T]he judicial duty to pronounce, based on the law, a decision on a matter in dispute ... *lies at the heart of a judge’s highest responsibility and function.*”¹⁴⁷ Such “pronouncements adjudicating and settling matters in dispute enjoy a legal obligatory nature and effect,” thus the PTC “cannot refrain from adjudicating matters before [it],” even when the law is “silent, obscure or insufficient.”¹⁴⁸ The PTC has a “commitment to legal certainty and transparency of proceedings” under Rule 21,¹⁴⁹ i.e., to interpret the ECCC framework “so as to always safeguard the interests” of the Charged Person.¹⁵⁰ It also has the inherent authority “to determine incidental issues which arise as a direct consequence of the procedures of which [it is] seised by reason of the matter falling under [its] primary jurisdiction,”¹⁵¹ and is obliged to exercise it in this

¹⁴³ CIJs’ Decision on Forwarding Case File 003, para. 23.

¹⁴⁴ *Id.*, para. 24.

¹⁴⁵ *Id.*, para. 25.

¹⁴⁶ Case 004/2 PTC Considerations, paras. 41, 122.

¹⁴⁷ *Id.*, para. 122 (emphasis added).

¹⁴⁸ *Id.*, para. 122; French Civil Code, Art. 4: “A judge who refuses to give judgment on the pretext of legislation being silent, obscure or insufficient may be prosecuted for being guilty of a denial of justice.” [Legifrance Translation].

¹⁴⁹ Case 004/2 PTC Considerations, para. 68.

¹⁵⁰ *Id.*, para. 51.

¹⁵¹ *Id.* See also Decision on Request For the PTC To Take a Broad Interpretation On The Permissible Scope of Appeal Against The Closing Order & To Clarify The Procedure for Annuling the Closing Order, or Portions

instance “by the imperative need to ensure good and fair administration of justice.”¹⁵² Lastly, this Request concerns “issues of general significance for the ECCC’s jurisprudence and legacy.”¹⁵³ a ruling would clarify the procedure once and for all, and for the ECCC’s final case in the investigation stage, thereby saving time, judicial resources, and donor funding.

III. LAW AND ARGUMENT

47. 13 years of pre-trial proceedings against Mr. MEAS Muth does not, by any stretch of the imagination, comport with his right to expeditious proceedings enshrined in the Cambodian Constitution, in the ECCC framework, and in human rights conventions the world over. Yet this Odyssey continues. Case 003, which remains with the PTC, is in a judicial quagmire. As with the Charged Person in Case 004/2, the National and International components of the PTC disagree on whether Mr. MEAS Muth meets the jurisdictional requirements to be tried by the ECCC. Cassandra-esque as it may sound, as night follows day, further disagreements, further stalemates, and further delays inevitably lie ahead, which inevitably will result in further abuses of process and continued violations of Mr. MEAS Muth’s constitutionally guaranteed fair trial rights. The PTC cannot abdicate its responsibilities. Punting the matter to other Chambers to cut the Gordian knot and resolve the impasse in Case 003 – for which, bluntly, the PTC cannot avoid responsibility – is not a viable option. If the PTC is incapable of reaching a supermajority to send Mr. MEAS Muth to trial, it must terminate Case 003, seal the Case File, and archive it. Either way, the PTC *must* conclusively act expeditiously. Mr. MEAS Muth has rights.

A. Mr. MEAS Muth has a right to expeditious proceedings

48. Rule 21(4) requires that proceedings before the ECCC “be brought to a conclusion ‘within a reasonable time.’”¹⁵⁴ The right to expeditious proceedings in Rule 21(4) “with its counterpart in Article 35^{new} of the ECCC Law, is a fundamental principle in Article

Thereof, If Necessary, 28 April 2016, D158/1, para. 11; *Case of NUON Chea et al*, 002/19-09-2007-ECCC-TC/SC(26), Decision on Co-Prosecutor’s Request for Clarification, 26 June 2013, E284/2/1/2, para. 12.

¹⁵² Case 004/2 PTC Considerations, para. 51.

¹⁵³ *Id.*, paras. 32, 50.

¹⁵⁴ *Case of IM Chaem*, 004/1/07-09-2009-ECCC/OCIJ (PTC50), Considerations on the International Co-Prosecutor’s Appeal of Closing Order (Reasons), 28 June 2018, D308/3/1/20 (“Case 004/1 PTC Considerations”), para. 28; Case 004/2 PTC Considerations, para. 61; Case 003 PTC Considerations, para. 135.

14(3)(c) of the International Covenant on Civil and Political Rights ('ICCPR'),¹⁵⁵ is incorporated in Articles 31 and 38 of the Cambodian Constitution,¹⁵⁶ and is also reflected in European, African, and American human rights conventions.¹⁵⁷

49. The right to expeditious proceedings is “designed to avoid keeping persons too long in a state of uncertainty about their fate”¹⁵⁸ and “applies at all stages of the proceedings before the ECCC, including the pre-trial stage.”¹⁵⁹ “The starting point for assessing the reasonable duration of criminal proceedings is when the suspect was officially notified that he would be prosecuted even if he is not formally charged until later.”¹⁶⁰
50. An assessment of the expeditiousness of the proceedings must be conducted “in light of the circumstances,” considering “the conduct of the competent authorities,” the complexity of the case, and the Charged Person’s conduct.¹⁶¹ “[F]actors informing expeditiousness” include “the age and health of the Charged Person, the effect of delay on the evidence and witness testimony, and the overall length of the investigation.”¹⁶²

¹⁵⁵ Case 004/1 PTC Considerations, para. 28; Case 004/2 PTC Considerations, para. 61; Case 003 PTC Considerations, para. 135.

¹⁵⁶ Article 31 of the Cambodia Constitution requires that the fair trial rights set out in, *inter alia*, the ICCPR be respected. The Agreement and Establishment Law similarly requires that the fair trial rights set out in the ICCPR must be respected. *See* Agreement, Arts. 12(2), 13(1); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea (2004) (“Establishment Law”), Arts. 33 new, 35 new.

¹⁵⁷ European Convention on Human and Peoples’ Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221, Art. 6(1); African (Banjul) Charter on Human and Peoples’ Rights, 27 June 1981, 1520 U.N.T.S. 217, Art. 7(1); American Convention on Human Rights, 1144 U.N.T.S. 123, 18 July 1978, Art. 7(5).

¹⁵⁸ Human Rights Committee, General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, para. 35.

¹⁵⁹ *See* Considerations on MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Re-Issued Decision on MEAS Muth’s Motion To Strike The International Co-Prosecutor’s Supplementary Submission, 26 April 2016, D120/3/1/8, Opinion of Judges Beauvallet and Baik (“International PTC Considerations on Motion to Strike the Supplementary Submission”), para. 35, citing *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC42), Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6, para. 13. *See also* Human Rights Committee, General Comment No. 32, Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial, CCPR/C/GC/32, 23 August 2007, para. 35 (“General Comment No. 32): “All stages, whether in first instance or on appeal must take place ‘without undue delay.’”

¹⁶⁰ International PTC Considerations on Motion to Strike the Supplementary Submission, para. 35 (internal citations omitted).

¹⁶¹ International PTC Considerations on Motion to Strike the Supplementary Submission, para. 37 (internal citations omitted).

¹⁶² International PTC Considerations on Motion to Strike the Supplementary Submission, para. 35 (internal citations omitted).

B. The delay in the 13-year long Case 003 pre-trial proceedings is unreasonable

51. The manifestly “excessive and unavoidable delays”¹⁶³ in the 13-year Case 003 pre-trial proceedings are the result of the ways in which the “competent authorities”¹⁶⁴ – the ECCC’s National and International components – dealt with their disagreements on whether Mr. MEAS Muth should be sent to trial:¹⁶⁵
- a. The Co-Prosecutors’ disagreement at the outset of the Case 003 investigation caused a one-year delay in the filing of the Introductory Submissions, since seizing the PTC meant responses would follow, further requests would be made by the Co-Prosecutors, and further particulars would be requested by the PTC;¹⁶⁶
 - b. The CIJs – one NCIJ and five ICIJs – investigated for 11 years, with occasional delays, ultimately resulting in a disagreement over whether the ECCC has personal jurisdiction over Mr. MEAS Muth and the issuance of separate and opposing Closing Orders;¹⁶⁷
 - c. The National PTC Judges, on at least three occasions prior to the conclusion of the investigation and issuance of the Closing Orders, expressed their view that they did not accept that the ECCC has personal jurisdiction over Mr. MEAS Muth,¹⁶⁸ reiterating their agreement with the NCP at the outset of Case 003 that it should neither have been prosecuted nor investigated since “the suspects are not senior leaders and/or those who were most responsible;”¹⁶⁹

¹⁶³ Case 003 PTC Considerations, para. 149.

¹⁶⁴ See International PTC Considerations on Motion to Strike the Supplementary Submission, para. 37 (internal citations omitted).

¹⁶⁵ See International PTC Considerations on Motion to Strike the Supplementary Submission. para. 37.

¹⁶⁶ See *supra*, paras. 2-3. Annex I: Public Redacted Version Consideration of the PTC Regarding the Disagreement Between the Co-Prosecutors Pursuant to Internal Rule 71, 18 August 2009, D1/1.3, paras. 1-9, 45.

¹⁶⁷ See *supra*, paras. 4-11.

¹⁶⁸ Considerations on MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Re-Issued Decision on MEAS Muth’s Motion to Strike the International Co-Prosecutor’s Supplementary Submission, 26 April 2016, D120/3/1/8, Opinions of Judges Prak Kisman, Ney Thol, and Huot Vuthy, para. 27; Decision related to (1) appeal against decision on nine applications to seize the Pre-Trial Chamber with requests for annulment and (2) the two annulment requests referred by the International Co-Investigating Judge, 13 September 2016, D165/2/26, Opinions of Judges Prak Kisman, Ney Thol, and Huot Vuthy regarding Meas Muth’s Nine Applications for Annulment (“Opinions of Judges Prak Kisman, Ney Thol, and Huot Vuthy regarding Meas Muth’s Nine Applications for Annulment”), para. 96; Decision on Appeal Against the International Co-Investigating Judge’s Decision on Request for Clarification concerning Crimes Against Humanity and the Nexus with Armed Conflict, 10 April 2017, D87/2/1.7/1/1/7, Opinions of Judges Prak Kisman, Ney Thol, and Huot Vuthy (Opinions of Judges Prak Kisman, Ney Thol, and Huot Vuthy regarding Armed Conflict”), para. 72

¹⁶⁹ Opinions of Judges Prak Kisman, Ney Thol, and Huot Vuthy regarding Meas Muth’s Nine Applications for Annulment, para. 96; Opinions of Judges Prak Kisman, Ney Thol, and Huot Vuthy regarding Armed Conflict, para. 72.

- d. The PTC took 16 months after oral arguments on the Closing Orders in Case 003 to declare the issuance of two Closing Orders illegal (after doing so in Case 004/2), not apply any of the remedies outlined by the SCC (that were based on the PTC's own pronouncements), and yet again, issue separate contradicting opinions – respectively for Case 003 to be archived and sent to trial;¹⁷⁰ and
- e. The CIJs, when requested to forward the Case File following the PTC's Considerations, determined that they are not seized of the matter, thus unable to act.¹⁷¹
52. Complexity neither explains nor excuses the 13-year pre-trial proceedings in Case 003.¹⁷² The pre-trial proceedings in Case 003 are more than triple the length of the pre-trial proceedings in Case 002, which concerned four Charged Persons in relation to 24 crime sites and events, in addition to the history of the Communist Party of Kampuchea, its administrative structures, military structures, and policies.¹⁷³ Contrastingly, Case 003 concerns one Charged Person in relation to eight crime sites and events and his Revolutionary Army of Kampuchea role.¹⁷⁴
53. Mr. MEAS Muth's conduct has not caused any delays in the proceedings.¹⁷⁵ He complied with the conditions ordered by ICIJ Bohlander,¹⁷⁶ and employed no dilatory tactics. And despite the International PTC Judges' findings to the contrary, ICIJ Bohlander charging Mr. MEAS Muth in person in Battambang in 2015 did not cause any delays.¹⁷⁷
54. Mr. MEAS Muth is 82 years old.¹⁷⁸ For the past 13 years,¹⁷⁹ he has lived with the weight and public stigma of being under investigation for crimes against humanity, grave breaches of the Geneva Conventions, genocide, and national crimes, with no definitive answer in sight on whether he will face trial. He has been indicted by one ICIJ, yet foreseeably has

¹⁷⁰ Case 003 PTC Considerations, p. 40. *See supra*, paras. 27-37.

¹⁷¹ *See supra*, paras. 39-45.

¹⁷² *See International PTC Considerations on Motion to Strike the Supplementary Submissions*, para. 37.

¹⁷³ *See Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2011, D427.

¹⁷⁴ Closing Order, 28 November 2018, D267.

¹⁷⁵ *See International PTC Considerations on Motion to Strike the Supplementary Submissions*, para. 37.

¹⁷⁶ *Contra* Case 003 PTC Considerations, paras. 351-58. Mr. MEAS Muth was permitted to travel to Thailand to receive medical care as agreed when charged by ICIJ Bohlander.

¹⁷⁷ *Contra International PTC Considerations on Motion to Strike the Supplementary Submissions*, para. 45.

¹⁷⁸ *Id.*, para. 35, finding that the age and health of the Charged Person are factors to be considered in assessing undue delay. *See also* Written Record of Initial Appearance, 14 December 2015, D174.

¹⁷⁹ *International PTC Considerations on Motion to Strike the Supplementary Submissions*, para. 35.

no opportunity to challenge that Indictment – whether at trial by the ECCC or in a Cambodian Court – which now hangs over him, and his family, in perpetuity.

55. It will be 43 years after the events in Case 003 before Mr. MEAS Muth can reasonably expect to be tried – assuming the PTC agrees by supermajority to send him to trial.¹⁸⁰ As time lapses, “memories of witnesses fade, witnesses may die or become untraceable, evidence deteriorates or ceases to exist.”¹⁸¹ The prospect of a fair trial for Mr. MEAS Muth – let alone one conducive to ascertaining the truth – is exponentially diminishing.

C. Trial and appeal proceedings in Case 003 will last at least four years with an inevitable outcome

56. In 2026, Mr. MEAS Muth can expect to receive an appeal judgment from the SCC, upholding the TC’s acquittal after it splits on the preliminary objection of lack of jurisdiction – *if* the PTC agrees by supermajority to send him to trial and *if* there are no unforeseen delays. Proverbially twisting Mr. MEAS Muth in the ECCC winds for 18 years defies expeditiousness, occasioning profound violations of his fair trial rights.

57. Realistically, given the TC’s previous timelines, a trial would not begin until May 2022, after trial management hearings and preliminary objections.¹⁸² As a threshold jurisdictional question, the TC would have to decide by supermajority whether Mr. MEAS Muth falls within the ECCC’s jurisdiction.¹⁸³ Since Rule 89(1) dictates that “[t]he proceedings shall continue *unless* the [TC] *issues immediately a decision* which has the effect of terminating the proceedings,” substantive hearings would proceed unless the TC decides by supermajority to terminate the case.

58. Assuming the TC does not terminate the case for lack of personal jurisdiction, the trial is likely to last approximately as long as it took in Cases 001 and 002/01 (one to two years),

¹⁸⁰ In 2022 at the earliest, *see infra*, para. 57.

¹⁸¹ *See Situation in Myanmar*, ICC-RoC46(3)-01/18-37, Decision on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” 6 September 2018, para. 86. *See also* International PTC Considerations on Motion to Strike the Supplementary Submissions, para. 35 (finding that the impact of the delay on the evidence and witnesses is a factor to be considered in assessing undue delay).

¹⁸² *Case of NUON Chea et al.*, 002/19-09-2007/ECCC/TC, Case 002/01 Judgement, 7 April 2014, E313, (“Case 002/1 Trial Judgment”), paras. 3-7. The Trial Chamber in Case 002 took eleven months Trial Chamber’s seizure of the case on 13 January 2011 and the initial hearing.

¹⁸³ Agreement, Art. 4(a).

with a trial judgment to be expected nine months later.¹⁸⁴ Under Rule 98(4), reflecting Article 4(a) of the Agreement, a supermajority is required for a conviction.

59. Assuming Mr. MEAS Muth is acquitted – a reasonable assumption considering the National TC Judges’ statements in Case 004/2 that the case was dismissed by the PTCs’ considerations¹⁸⁵ – and the ICP appeals the acquittal, a SCC judgment can be expected in 2026.¹⁸⁶ Rule 111, reflecting the supermajority rule for the SCC in Article 4(b) of the Agreement, dictates that “[w]here an appeal is rejected, the trial judgment shall become final and no further appeal against such decision shall be allowed,” meaning the TC’s acquittal would stand.

D. Unless the PTC reverses and decides by supermajority to send Case 003 to trial, it must terminate, seal, and archive Case File 003

60. If the PTC is unable to come to a consensus or supermajority and issue a final, binding decision concluding the pre-trial proceedings in Case 003, fulfilling its overriding duty to ensure Mr. MEAS Muth’s fair trial rights, it must terminate the proceedings in Case 003, seal the Case File, and archive it to avoid an abuse of process and a miscarriage of justice.

61. The PTC is “responsible for ensuring, at the investigation stage, that the fundamental principles underlying the criminal procedure applicable before the ECCC are respected.”¹⁸⁷ This non-discretionary responsibility demands the PTC to ensure that proceedings are conducted according to international standards of due process,¹⁸⁸ including terminating cases for abuse of process – an internationally recognized doctrine implicit in the Agreement and Establishment Law, provided for in Cambodian law, and acknowledged in ECCC jurisprudence.¹⁸⁹

¹⁸⁴ *Case of KAING Guek Eav*, 001/18-07-2007/ECCC/TC, Judgement, 26 July 2010, E188, para. 10; Case 002/1 Trial Judgment, para. 8.

¹⁸⁵ Trial Chamber Statement in Case 004/2, p. 2, stating that the Case 004/2 was closed by the PTC’s determination and that “there will be no trial of AO An now or in the future.”

¹⁸⁶ In Case 001, the Appeal Judgement was rendered 18 months after the Trial Judgement. *Case of KAING Guek Eav*, 001/18-07-2007-ECCC/SC, Appeal Judgement, 3 February 2012, F28. In Case 002/01, the Appeal Judgement was rendered 27.5 months after the Trial Judgement. *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/SC, Appeal Judgement, 23 November 2016, F36.

¹⁸⁷ Case 004/2 PTC Considerations, para. 52.

¹⁸⁸ *See Id.* *See also* Cambodian Constitution, Art. 31; Agreement, Art. 12(2); Establishment Law, Art. 33 new.

¹⁸⁹ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ (PTC42), Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse

62. The Agreement implicitly provides termination by permanent stay of the proceedings by explicitly envisioning the UN withdrawing from the Agreement and ceasing its assistance to the ECCC in certain circumstances – such as when the ECCC ceases to function in a manner that conforms to the Agreement.¹⁹⁰ Although the UN has not withdrawn from the Agreement, the ECCC has ceased to function in Case 003 in a manner that conforms to the Agreement: there is no reasonable prospect of Mr. MEAS Muth being tried within a reasonable time,¹⁹¹ nor a reasonable prospect that he would ultimately be convicted.¹⁹²
63. The Establishment Law provides that where Cambodian procedure does not deal with a particular question, guidance may be sought at the international level.¹⁹³ Under the internationally recognized doctrine of abuse of process, the PTC may “decline to exercise the court’s jurisdiction in cases where to exercise that discretion in light of *serious* and *egregious* violations of the accused’s rights would prove detrimental to the court’s integrity.”¹⁹⁴ While discretionary, circumstances considered, objectively, the PTC cannot but “find [that] there has been an abuse of process and decline to exercise their jurisdiction by permanently staying, thus effectively terminating, the proceedings without adjudication.”¹⁹⁵
64. The CIJs and SCC have found that Cambodian Criminal Procedure contemplates termination of proceedings. Based on their “extensive study of the law relating to a stay of proceedings, both nationally and internationally,” the CIJs were “confident that both Cambodian and international law foresee scenarios where such an order would be

of Process (D264/1), 10 August 2010, D264/2/6, para. 10. Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for YIM Tith, 11 August 2017, D249/6, para. 16.

¹⁹⁰ Agreement, Art. 28.

¹⁹¹ *See supra*, paras. 51-55.

¹⁹² *See supra*, paras. 56-59.

¹⁹³ Establishment Law, Art. 23 new. Further, “Article 14 of the ICCPR provides for overriding rights *which will transcend local procedures...*” *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC42), Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6, para. 13 (emphasis added).

¹⁹⁴ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC42), Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6, paras. 22-23. *See also Prosecutor v. El Sayed*, CH/AC/2010/02, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing, 10 November 2010, para. 46.

¹⁹⁵ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-OCIJ(PTC42), Decision on IENG Thirith’s Appeal Against the Co-Investigating Judges’ Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process (D264/1), 10 August 2010, D264/2/6, para. 22.

appropriate.¹⁹⁶ Stating that while criminal action may not be “extinguished” except in situations involving the death of the accused, the expiry of a statute of limitations, the grant of an amnesty, the abrogation of the law, and *res judicata*, the SCC explained that Cambodian law does: “provide[] for the power to ‘suspend’ or ‘stay’ proceedings in certain circumstances of a *lasting impediment* in the conduct of the proceedings....”¹⁹⁷

65. The disagreement that has pervaded the Co-Prosecutors, the CIJs, and the Chambers – on whether Mr. MEAS Muth should be sent to trial at all – is an intractable impediment to the conduct of the proceedings. Aside from the 13-year investigation with no conclusion, aside from the stalemates caused by rigidly held disagreements, aside from the further delays and stalemates, from the hithering and dithering, blame-fixing, and recriminations that can be expected (as night follows day), Mr. MEAS Muth is trapped in a recurring spiral of circumstances which, bluntly, the PTC indisputably knew would result, as this theatrical play had already featured at the ECCC for eight months – the period between the archiving of Case 004/2 and the Case 003 Considerations.¹⁹⁸

66. The PTC unanimously concluded the CIJs to have systematically abused the process:

- a. The CIJs “committed a gross error of law in this case by finding that the ECCC legal framework permits the issuance of separate and opposing Closing Orders,”¹⁹⁹ which “undermine[d] the very foundations of the hybrid system and proper functioning of the ECCC;”²⁰⁰
- b. The CIJs “were aware of the difficulties their actions would be causing not only on appeal, but beyond the pre-trial and appellate stage of the Case 003 proceedings,”²⁰¹ yet

¹⁹⁶ Combined Decision on the Impact of the Budgetary Situation on Cases 003, 004, and 004/2 and Related Submissions by the Defence for YIM Tith, 11 August 2017, D249/6, para. 16.

¹⁹⁷ *Case of NUON Chea et al.*, 002/19-09-2007-ECCC-TC/SC (16), Decision on Immediate Appeal Against the Trial Chamber’s Order to Unconditionally Release the Accused IENG Thirith, 14 December 2012, E138/1/10/1/5/7, para. 38 (emphasis added).

¹⁹⁸ Case 004/2 was sealed and archived on 14 August 2020 and the Case 003 PTC Considerations were issued on 7 April 2021. *See Case of AO An*, 004/2/07-09-2009-ECCC-OCIJ, Order Sealing and Archiving Case File 004/2, 14 August 2020, D363/3.

¹⁹⁹ Case 003 PTC Considerations, para. 88. *See also id.* para. 105, where the PTC claimed that the Co-Investigating Judges committed “manifest errors of law on which their reasoning is based.”

²⁰⁰ *Id.*, para. 106.

²⁰¹ *Id.*, para. 107.

wantonly refrained from exercising their judicial duty to decide matters of which they were seized;²⁰²

- c. The CIJs “may have intended to defeat the default position and frustrate the authority of the [PTC]” by agreeing to simultaneously issue separate and opposing Closing Orders;²⁰³ and
- d. The CIJs’ “errors have jeopardised the whole system upheld by the Royal Government of Cambodia and the United Nations” and their “*mauvaises pratiques* may amount to a denial of justice.”²⁰⁴

67. While these conclusions are as meritless (debunked by the Defence)²⁰⁵ as they are irrelevant, for the PTC to now cause further delays by failing to take all necessary action with all deliberate speed to terminate the proceedings against Mr. MEAS Muth, amounts to no less than an abuse of process. Put differently, were the PTC to send Case 003 to trial knowing that there as well Mr. MEAS Muth’s right to expeditious proceedings will be held in abeyance due to irreconcilable differences and obstinance similar to those existing between the National and International PTC Judges, the PTC would – with full knowledge and responsibility – also be engaging in the type of abuse of process it claimed of the CIJs.

68. Only the PTC is seized of and has judicial authority to seal and archive Case 003. Following the appeals against the Closing Orders, the Case File was forwarded to the PTC under Rule 69(1). While Rule 69(2)(b) – the only rule in the ECCC framework concerning sealing and archiving – provides that the CIJs would be responsible for sealing and archiving the case if *no* appeals are filed, Rule 69 was not envisaged to deal with the scenario of opposing Closing Orders (let alone illegally issued Closing Orders). Given the PTC’s inherent

²⁰² *Id.*, para. 105.

²⁰³ *Id.*, para. 108.

²⁰⁴ *Id.*, para. 108.

²⁰⁵ MEAS Muth’s Request for Clarification, paras. 15-39; MEAS Muth’s Supplement, paras. 27-43; MEAS Muth’s Intervention Request, para. 11; MEAS Muth’s Response to the International Co-Prosecutor’s Request to Forward Case File 003 to the Trial Chamber, 12 May 2021, D270/4, para. 15. *See also* Agreement, Art. 5(1), 7(4); Establishment Law, Art. 27; Rules (1), 14(2), 14(7), 72(1), 72(2), 77(13)(a), 77(13)(b). *Case of NUON Chea et al.*, 002/19-09-2007-ECCC/OCIJ (PTC75), Decision on IENG Sary’s Appeal Against the Closing Order, 11 April 2011, D427/1/30, para. 274 (holding that the CIJs “are under no obligation” to seize the PTC when they do not agree on an issue before them).

powers and authority as the final jurisdiction over the investigation,²⁰⁶ logic dictates that it has the authority to terminate, seal, and archive Case File 003.

69. The “excessive and avoidable delays” in Case 003 “depart[] from the ECCC legal framework.”²⁰⁷ The PTC should invoke its inherent powers to terminate, seal, and archive Case File 003 “in order to give effect to the higher-order fair trial principles of providing for an orderly disposal of the case and of safeguarding Meas Muth’s right to a speedy final determination of the case against him,” just as the CIJs vowed to do if no other body in the ECCC is willing to muster the courage to take it upon itself.²⁰⁸

IV. CONCLUSION

70. Mr. MEAS Muth is being denied of his right to a fair trial and to a final and speedy determination of the case against him. He has been under judicial investigation since 7 September 2008. The proceedings against him remain pending, with the two judicial factions of the PTC obstinately clinging to their opposing positions, compromising the international standards the ECCC must adhere to, uncompromisingly.

71. To have an unresolved Indictment hanging precariously over Mr. MEAS Muth’s head like a sword of Damocles in perpetuity is, as previously noted, an irreparable and permanent deprivation of his constitutionally protected rights to be presumed innocent, defend himself, have proceedings against him brought to a conclusion within a reasonable time, equal protection before the ECCC, and have doubt resolved in his favor.²⁰⁹ Forever presumed guilty, Mr. MEAS Muth would be unable to challenge the Indictment since there is no procedural mechanism to dismiss one issued from the ECCC, and would have no opportunity to demonstrate his innocence. In the CIJs’ understanding, leaving “an indictment hang over the charged person by simply ceasing the operations of the ECCC” is “not compatible with the basic demands of the rule of law.”²¹⁰

²⁰⁶ Case 003 PTC Considerations, para. 51.

²⁰⁷ *Id.*, para. 149.

²⁰⁸ CIJs’ Decision on Forwarding Case File 003, para. 42.

²⁰⁹ MEAS Muth’s Appeal Against the International Co-Investigating Judge’s Indictment, 19 April 2019, D267/4, para. 4; MEAS Muth’s Submission on the Budgetary Situation of the ECCC and its Impact on Case 003, 5 June 2017, D249/2, para. 29.

²¹⁰ Request for Submissions on the Budgetary Situation of the ECCC and its Impact on Cases 003, 004, and 004/2, 5 May 2017, D249, para. 54.

72. The PTC Judges have the authority, indeed duty, to prevent further violations of Mr. MEAS Muth's fair trial rights and to preserve the integrity of the ECCC's legacy. They cannot and must not leave the case in a state of judicial limbo by washing their hands of the matter. The PTC could have, as suggested by the Defence – and as echoed also by the SCC – investigated the case itself and issued its own valid Closing Order.²¹¹ Regrettably, by declining to deviate from their previous posture of not collegially investigating the case or issuing a revised Closing Order, and by issuing separate contradictory Considerations, the National and International Judges of the PTC are condemning Mr. MEAS Muth to the same uncertainty, the same procedural merry-go-round, the same predicament as the Charged Person in Case 004/2, who, but for the intervention of the SCC (to which the International Judges take umbrage), would still be in legal limbo, yet without the possibility of due process, enduring the psychological fear and social stain of having an Indictment hanging over him.
73. It is high time for the PTC to act decisively. If the PTC Judges are incapable of reaching a supermajority to send Case 003 to trial, they *must* adhere to their judicial oaths and faithfully follow the law by exercising their authority to terminate the proceedings, to seal the Case File, and to archive it. Anything less would be an abdication of their responsibilities, egregiously violating of Mr. MEAS Muth's fair trial rights.

WHEREFORE, the PTC should:

- A. **FIND** the Request admissible;
- B. **TERMINATE** Case File 003;
- C. **SEAL** Case File 003; and
- D. **ARCHIVE** Case File 003.

Respectfully submitted,



 ANG Udom





 Michael G. KARNAVAS

Co-Lawyers for Mr. MEAS Muth
 Signed in Phnom Penh, Kingdom of Cambodia on this **17** day of **June, 2021**

²¹¹ Case 004/2 SCC Decision, para. 61, Case 004/2 PTC Considerations, para. 30; MEAS Muth's Supplement, para. 30; MEAS Muth's Request for Clarification, paras. 22-23; Transcript of Appeal Hearing in Case 003, 29 November 2019, D266/18.2, 11.59.14-12.03.17.